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Pbi Freight Service, Four Corners Trucking, Link Trucking, Inc., Magna-Garfield Truck Line, Uintah Freightways, Garrett Freightlines, Inc. And Milne Truck Lines, Inc v. Wycoff Company, Incorporated, And Public Service Commission of Utah, Et Al. : Brief of Plaintiffs

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

PBI FREIGHT SERVICE, FOUR CORNERS)
TRUCKING, LINK TRUCKING, INC.,)
MAGNA-GARFIELD TRUCK LINE, UINTAH)
FREIGHTWAYS, GARRETT FREIGHTLINES,)
INC. and MILNE TRUCK LINES, INC.,)

Plaintiffs,)

vs.)

WYCOFF COMPANY, INCORPORATED, and)
PUBLIC SERVICE COMMISSION OF UTAH,)
ET AL.,)

Defendants.)

CASE NO. 1255

BRIEF OF PLAINTIFFS

Review of the Orders of the
Public Service Commission of Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

PBI FREIGHT SERVICE, FOUR
CORNERS TRUCK SERVICE, LINK
TRUCKING, INC., MAGNA-
GARFIELD TRUCK LINES, UINTAH
FREIGHTWAYS, GARRETT FREIGHT-
LINES, AND MILNE TRUCK LINES,

Plaintiffs,

vs.

WYCOFF COMPANY, INCORPORATED
and PUBLIC SERVICE COMMISSION
OF UTAH, et al.,

Defendants.

CASE NO. 16455

BRIEF OF PLAINTIFFS

Plaintiffs PBI Freight Service (PBI), Four Corners Truck Service (Four Corners), Link Trucking, Inc. (Link), Magna-Garfield Truck Lines (M&G), Uintah Freightways (Uintah), Garrett Freightlines (Garrett) and Milne Truck Lines (Milne) will collectively be referred to herein as the "the plaintiffs" and occasionally as "protestants" or "protesting carriers", the latter designation having been used during the course of proceedings before the Utah Public Service Commission. Plaintiffs will also be referred to individually by name.

The defendant Public Service Commission of Utah will be referred to as the "Commission."

The defendant Wycoff Company, Incorporated will be referred to as "defendant Wycoff" or "Wycoff" or "applicant", the latter term having been used during the course of proceedings before the Utah Public Service Commission.

STATEMENT OF THE CASE

This proceeding involves an application before the Commission in which defendant Wycoff seeks operating authority as a common motor carrier for the transportation of general commodities in express service, with certain exceptions, over regular routes between all points in the State of Utah, limited to the transportation of packages not to exceed 100 pounds each and shipments not to exceed a total of 1,000 pounds from one consignor to one consignee on the same day.

DISPOSITION BY THE PUBLIC COMMISSION OF UTAH

The Commission, without sufficient evidence demonstrating a need and a necessity for the proposed service, granted the application of Wycoff. Plaintiffs filed a Petition for Reconsideration and Rehearing and a Motion to Stay with the Commission and defendant Wycoff replied. The Commission denied the Petition and the Motion.

RELIEF SOUGHT ON APPEAL

Plaintiffs seek to have the Supreme Court set aside and nullify the Orders of defendant Public Service Commission dated March 13, 1979 and May 1, 1979.

STATEMENT OF FACTS

By application filed February 28, 1978, Wycoff Company, Incorporated ("Wycoff") seeks authority to transport:

"General commodities in express service (except Class A and B explosives, household goods and commodities requiring special equipment) over regular routes from all points in the State of Utah to all points in the State of Utah, said authority shall be limited to the transportation of packages not to exceed 100 pounds each and shipments not to exceed a total of 1,000 pounds from one consignor to one consignee on the same day." (R. p.1222).

Applicant restricted its authority at the commencement of hearing as follows:

"No service shall be authorized to points in San Juan County, except those points in said County lying both on and east of U.S. Highway 163, formerly known as Utah Highway 47, and on and north of U.S. Highway 666, formerly known as U.S. Highway 160, and except the City of Monticello and its commercial zone." (R. p.5).

The application was opposed by plaintiffs. Plaintiffs, individually and collectively through interline, hold authority to and transport general commodities throughout the area sought to be served by applicant. (Exs. 79, 80, 81, 82, 83 and 84).

Wycoff in this proceeding seeks to increase the 100 pound per shipment limitation contained in its Certificate No. 1679 to 1,000 pounds per shipment. Only 48 public witnesses whose testimony is contained in Exhibits 19-78 and in the Record at pages 57 through 924 appeared for Wycoff. When compared to the total number of shippers and receivers of freight in Utah, the percentage is so small that it is hardly capable of being calculated. The commodities represented generally only included such things as auto parts.

The 48 witnesses purported to support a grant of statewide general commodity authority. In reference to the service of plaintiffs and other existing carriers, the supporting shippers alluded to such things as delay and inconvenience caused by shipments being interlined between two carriers, slow transit times, daily freight service not being provided to rural and sparsely populated areas, delivery problems, pick-up problems, damage to shipments, no Saturday service, post-dated freight bills, customer complaints, no rate allowance for shipments picked up rather than delivered, inconsistent delivery charges for off-route points, refusal to accept checks for C.O.D. shipments, lost shipments, no single carrier with statewide authority, unresponsive and uncooperative attitudes, and refusals to compete.

Almost without exception, the allegations of the supporting shippers concerning the service of plaintiffs were specifically rebutted through documentary evidence. (Exs. 79-84). Said exhibits offered by plaintiffs demonstrate that the plaintiffs are dependent upon Utah intra-state shipments of less than 1,000 pounds for their livelihood.

A grant of authority to Wycoff and the resulting loss of traffic to plaintiffs affects the ability of plaintiffs to continue to provide service to the shipping public of the State of Utah in the areas in which they are authorized and obliged to serve. (Exs. 79-84). Plaintiffs presently maintain sufficient amounts of personnel, terminals, equipment, and a service capacity to provide for and meet the needs of the supporting shippers.

The record demonstrates that Wycoff has made a practice of separating shipments to avoid the 100 pound restriction in its existing Certificate No. 1679. (Ex. 66, R. 797, R. 849, R. 878, R. 591, R. 594, R. 674-676, R. 678, R. 685). This issue was discussed in detail by plaintiffs in their post-hearing Briefs and post-hearing Memorandums as well as their written Motions to Dismiss before the Commission. (R. 1264-1282, 1307-1318 and 1371-1410). The record reflects that Wycoff is in violation of the Commission's rules and regulations pertaining

to the use of equipment leases and "agents" for the pickup and delivery of freight. (R. 564-571, Ex. 54). Page 13 of Exhibit 1 demonstrates that Wycoff does not file the express schedules required by its Certificate No. 1679. Page 15 of Exhibit 1 as well as Exhibit 72 demonstrate that Wycoff does not provide the minimum level of service required by its Certificate No. 1679. Exhibit 17, page 2, 3, and 6 and R. 45-53 demonstrate that Wycoff is not financially fit to perform the service it seeks, as further explained by protestants in their Briefs before the Commission (R. 1379-1380 and 1390-1391). Wycoff did not demonstrate the operational, financial, or economic feasibility of its proposed operation (R. 19, 20, 533, and 534) as discussed by plaintiffs in their Briefs before the Commission. (R. 1380-1382 and 1391-1392).

Based on such a record, protestants moved for dismissal of the application of Wycoff orally (R. 924-927) and in writing. (R. 1264-1282). Said Motions were denied by defendant Commission (R. 1330).

Plaintiffs' documented evidence demonstrates that the service presently being provided for the supporting shippers by plaintiffs meets the alleged needs of said shippers.

In area served by Plaintiffs PBI and Four Corners, only a miniscule part of the shipping public

appeared in support of the Wycoff application. (Ex. 79 pp.4, 5). Principally their testimony involved auto parts which are expedited by PBI and Four Corners. (Ex. 79 pp.7-9). Documentary evidence was provided to show that PBI has provided overnight transportation service on nearly every shipment it has handled for shippers in its territory. (Ex. 79 pp.8-30). A more detailed summary of the transit studies offered by PBI and Four Corners is contained at pages 1393-1395 of the record. Exhibit 79 demonstrates that PBI and Four Corners have expended large amounts of risk capital in facilities, equipment and personnel for providing a transportation service within the State of Utah.

Plaintiffs Uintah and M&G likewise demonstrated that they provide the type of service claimed needed by supporting shippers including daily pickups, same-day service, drivers who assist in loading, late pickups, Saturday service, and protective service. (Ex. 83 pp.6-8). It was alleged that Uintah post-dates its freight bills. This allegation was completely rebutted through documentary proof. (Ex. 83 pp.E-5 - E-7). Uintah makes every effort to solve complaints concerning claims and found no outstanding claims for loss or damage to be pending, contrary to allegations of one supporting shipper. (Ex. 83 pp. 9-11). Where Uintah's transit time was criticized

in general terms by witnesses, documentary evidence was introduced showing that Uintah provides consistent overnight service. (Ex. 83 pp.11, 12 and E-25 - E-27 and E-29 - E-30). Uintah makes every effort to perform pickup service when called later than three o'clock p.m. The same service is not available from Wycoff. A more thorough explanation of these matters and a detailed breakdown of the traffic studies prepared by Uintah from documentary evidence are contained in Exhibit 83, pages E-1 - E-30 and at pages 1396-1398 of the record. Exhibit 83 demonstrates that Uintah and M&G have expended large amounts of risk capital in facilities, equipment and personnel for providing a transportation service within the State of Utah.

Link Trucking provides early and late pickups as requested, and regular daily pickups. Link provides protective service, flatbed trailers, and bulk tank equipment. (Ex. 84 pp.1-5). Link provides late pickups, same-day pickups, and overnight delivery between Salt Lake City on the one hand, and Roosevelt and Vernal on the other. (Ex. 84 p.6). The combination interline service of Link and PBI is an efficient service (Ex. 84 pp.6, 7). Link provides overnight service from Salt Lake City to all authorized points including Altamont. (Ex. 84 pp.7-11). Exhibit 84 demonstrates that Link has expended large amounts of risk capital in facilities, equipment and

personnel for providing a transportation service within the State of Utah.

In the case of Milne, appendices 5-15 to Exhibit 82 demonstrate that during July, 1978, Milne maintained overnight service on 97% of its deliveries, second day service on 3% of its deliveries, and on only one occasion was a shipment delivered on the third day. Exhibit 82 demonstrates that Milne has expended large amounts of risk capital in facilities, equipment, and personnel for providing a transportation service within the State of Utah.

Plaintiff Garrett is an efficient carrier of general commodities providing a variety of services including C.O.D. shipments, diversion or reconsignment privileges, van, flatbed and refrigerated equipment, exclusive use, expedited service, oversize and overweight capabilities, split deliveries and pickups, stops in transit, and order-notify shipments. (Ex. 80 pp.7, 8). Exhibit 80 demonstrates that Garrett has expended large amounts of risk capital in facilities, equipment and personnel for providing a transportation service within the State of Utah.

The intrastate Utah operations of plaintiffs are but marginally profitable at the present time. Plaintiffs have recently found it necessary to apply to the Public Service Commission for a 10% rate increase in order to

keep up with the constantly increasing costs of providing a transportation service within the State of Utah. (Exs. 79-84). Diversion of traffic to Wycoff will result in decreased operating efficiencies and increased costs, resulting in less available service at a higher cost to the shipping public of the State of Utah.

Plaintiffs' studies show the amount of total revenue which is derived from transporting shipments of less than 1,000 pounds within the State of Utah which is the traffic subject to being diverted from protestants to Wycoff. PBI and Four Corners computed 32.8% of its total intrastate revenue to be subject to diversion. (Ex. 79 p.5). Plaintiff Garrett computed revenues in the amount of \$66,365.00 to be divertible from it per year by Wycoff. (Ex. 80 p.11). Plaintiff Milne computes 46% of its intrastate revenue to be divertible. (App. 18 to Ex. 82). Plaintiffs Uintah and M&G stand to lose 37.5% of their intrastate revenue. (Ex. 83 p.4). Plaintiff Link computes the percentage of divertible traffic to be 35%. (Ex. 84 p.4).

Wycoff transports "split" shipments to avoid its present weight restrictions, and thereby has already diverted a substantial portion of the plaintiffs' traffic. This practice will continue on a larger scale upon approval

of a 1,000 pound per shipment weight limitation. (Ex. 80 pp.11, 12).

Exhibits 79-84 offered by plaintiffs demonstrate the economic hardship that will befall the plaintiffs upon a grant of this application, said hardship in turn befalling the shipping public in terms of curtailed services and/or increased costs of transportation. Plaintiffs explained and/or rebutted through documentation all of the allegations made by the public witnesses. (Exs. 79-84). The public testimony offered was not probative, was unsupported by documentary evidence, was not convincing, and was couched in very general terms. Allegations made concerned circumstances that were remote in time and that were not of a recurring nature. The public witnesses proved the fact that the existing service of plaintiffs is adequate to meet their needs. (Exs. 19-78, R. 57-924). The following are only a few examples of the recurring testimony of these types.

1. One witness claimed that deliveries at 12:30 were satisfactory but deliveries 1 hour and 17 minutes later at 1:47 were too late. Wycoff's times were not recorded. (R., pp.349, 356).

2. Another complained of shipments being delivered too early by PBI. The witness has complained to the Commission in writing about poor Wycoff service. (R., pp. 430, 431, 433 and 439-442).

3. A complaint of transit time could not be attributed to shipper, carrier or otherwise. (R., p.465).

4. One witness "spoke" in his canned testimony of a phone call. When asked what specifics he could remember, he replied "That long ago - that long ago, I do not." (R. pp.515, 516).

5. Still another Wycoff witness indicated that Uintah provides a consistent overnight service with deliveries being made around noon. (R., p.523).

6. Another has complained to the Public Service Commission concerning the service of Wycoff, specifically complaining of shortages; (R., p.549) and testified that he is required to file a claim for loss or damage with Wycoff an average of twice per month. (R. p.555).

7. One witness was so misinformed about the service proposal of Wycoff that it was his understanding that upon approval of the application, Wycoff would haul 1,000 lb. shipments and charge the witness less for the transportation than what is now charged for 100 lb. shipments. (R., p.563).

8. Another had little or no knowledge of the shipping practices of a regular weekly supplier. He does not know what day his shipments originate in Clearfield, Utah. (R., p.607). He was not sure about how his shipper selects a routing to be used, but knew that the arrangements for transportation were made by his shipper and not by himself. (R., p.608, 609). Although indicating a high level of familiarity with his "canned" written testimony, in at least one case he could not define or even pronounce the language contained in the statement. (R., p.613).

9. Another "witness" had little, if any, specific information about his company's needs for transportation service and testified "It's not my job to know that. I have somebody working for me that would make that decision. * * *" (R., p.636). He further indicated that he is never involved in routing nor which, if any, of his destination points require an interline. (R., p.637 and

638). The witness could not even name the protestants. (R., p.644). Portions of the testimony were overstated, attributable to the fact that a Mr. Dick Reese employed by applicant prepared the testimony. (R. p.647, 648). After learning that Uintah provides direct service without interline from Ogden, Utah, to Roosevelt, Utah, providing overnight service, the witness concluded "* * * It means that they were probably pretty good at picking it up in Ogden and getting it where it goes. * * *" (R., p.649 through 652). The witness summed up his lack of knowledge concerning his company's transportation needs when he was asked if he was qualified to testify as to the amount or quality of service available to his company at the present time by answering "I am not by any stretch of the imagination the duty expert, no." (R., p.657).

10. A witness was asked if he had reason to deny that Uintah was providing consistent overnight service. His answer was "No. I have no complaints about Uintah Freightways." (R., p.671). Concerning interline shipments, he was asked, "Wouldn't you agree with me that that statement is grossly overstated and that Uintah Freightways serves lots of points beyond Salt Lake City, do they not?" Answer: "That's true." (R., p.671).

11. Another was asked about size of shipments. He responded, "Probably - well, that's hard to say. This is our busy time of year. It very well could have been over 100 or a little bit under it. There is no way of knowing." (R. p.709, 710). When asked if he would use the presently authorized service of M & G and PBI, he indicated that he would not, even though he knew the service was available. (R., p.713, 716). He indicated that he has not used interline service, would not use interline service, and that any testimony given by him concerning interline service was pure supposition. (R., p.722).

12. A witness "requiring" pickup at 5:00 p.m. agreed that he would be in trouble

if every carrier came at 5:00 p.m. as he has only one loading door. (R., p.734).

13. Another did not prepare a transit study showing the present Wycoff service, even though the documents for such a study were available to him. (R., p.764).

14. One from Ogden has never even attempted to use the services presently available from Uintah because all of his shipments are small or are separated to avoid the restriction in the Wycoff authority. (R., pp.795, 796).

15. Another testified concerning service received from Wycoff and from Park City Truck Lines, but did not document any of his general statements with delivery receipts from either company. (R., p.809).

16. A Logan witness was "dissatisfied" over consistent next day Uintah service with deliveries made around 11:00 a.m. the day following shipment from Salt Lake. (Ex. 69, R., p.818-820).

17. A Salt Lake shipper indicated that all shipments which could be documented for his customers in Price and Helper, Utah, were delivered by Uintah Freightways overnight. (R., p.832). He was so unfamiliar with his own written testimony that he was bewildered by the questions concerning Frank's Glass and Fred's Glass, even though these were the two accounts he specifically "spoke" of in his "canned" testimony. (R., pp. 838, 839).

18. One stated his belief (Ex. 71) that certain shipments were delayed and that he could not explain the problem. A comparison of actual freight bills and bills of lading showed all shipments being delivered on time. (R. p. 854).

19. A Roosevelt witness was asked about his complaints concerning interline service. His response was "Well, I believe it does because they have two freight tickets. I am not - I don't know if they are

direct or anything about that. * * * (R., p.865). He was unaware of the ability of Uintah Freightways to provide direct single line service for him from Brigham City, Utah. (R., p.866).

20. PBI provides consistent overnight service from Salt Lake City, Utah to Nephi, Utah with deliveries between 8:30 and 11:00 every morning. (R., p.878 and 879).

21. Uintah provides consistent overnight service on inbound shipments to Brigham City, Utah, from Salt Lake City. (R., pp.904-907). When asked if he brought any documentary evidence with him to support his allegations pertaining to outbound shipments, he responded "I was not asked to do so. In fact, I have nothing with me." (R. p.909).

22. Still another attempted to document his complaints but his documents did not show delivery information. The only bill that did show delivery information showed overnight service performed by Uintah. (R. pp.916-918). The witness characterized the service of Wycoff as excellent and Uintah as "* * * a little better. * * *" (R., p.920).

The above examples cover almost 50% of the total testimony. The remaining testimony was similar.

Notwithstanding, the Commission granted the application as applied for. The action taken by the Commission is unsupported by both the facts and the law, exceeds the authority of said defendant Commission, and is contrary to the evidence and thereby unlawful, all of which requires this Honorable Court to set aside the Orders of the Commission.

ARGUMENT

POINT I:

THE REPORT AND ORDER AND ERRATUM ORDER OF THE COMMISSION ARE NOT SUPPORTED BY THE EVIDENCE AND THE LAW AND MUST BE SET ASIDE BECAUSE WYCOFF IS NOT A FIT AND PROPER PARTY TO RECEIVE A GRANT OF OPERATING AUTHORITY FROM THE COMMISSION; WYCOFF DOES NOT HAVE THE FINANCIAL ABILITY TO PROPERLY PERFORM THE SERVICE FOR WHICH IT SEEKS A CERTIFICATE; WYCOFF HAS FAILED TO DEMONSTRATE ANY OPERATIONAL, FINANCIAL OR ECONOMIC FEASIBILITY FOR THE PROPOSED OPERATION; WYCOFF HAS FAILED TO DEMONSTRATE THAT THE EXISTING TRANSPORTATION FACILITIES WITHIN THE SCOPE OF THE INSTANT APPLICATION ARE INADEQUATE TO MEET THE NEEDS OF THE SHIPPING PUBLIC; A GRANT OF THE WYCOFF APPLICATION IS DEVASTATING TO PROTESTANTS AND OTHER CARRIERS WHO PRESENTLY OPERATE TRANSPORTATION FACILITIES IN THE TERRITORY PROPOSED TO BE SERVED; AND THE PREJUDICIAL NATURE OF THE COMMISSION'S REPORT AND ORDER AS AFFIRMED BY THE COMMISSION'S ERRATUM ORDER DEMONSTRATES THAT THE COMMISSION ACTED ARBITRARILY, CAPRICIOUSLY, WITH PREJUDICE, AND THEREFORE UNLAWFULLY.

In considering applications for Certificates of Convenience and Necessity, the Commission must take into account the criteria set out in Section 54-6-5, Utah Code Annotated (1953, as amended), which provides in pertinent part:

"Before granting a certificate to a common motor carrier, the Commission shall take into consideration the financial ability of the applicant to properly perform the service sought under the certificate and also the character of the highway over which said common motor carrier proposes to operate and the effect thereon, and upon the traveling public using the same, and also the existing transportation facilities in the territory proposed to served. If the Commission finds

that the applicant is financially unable to properly perform the service sought under the certificate, or that the highway over which he proposes to operate is already sufficiently burdened with traffic, or that the granting of the certificate applied for will be detrimental to the best interests of the people of the State of Utah, the Commission shall not grant such certificate." (Emphasis added)

The supporting shippers appearing have not demonstrated that the public convenience and necessity require the proposed operations. The service of plaintiffs has consistently been same day or overnight between all points in the State of Utah. It must be concluded that plaintiffs have met the needs of the supporting shipper and of the shipping public in all respects. At the time of hearing, the equipment of plaintiffs was not being used to its capacity, and if it were, more equipment could be obtained by them.

It is patently clear from the record and the pleadings contained therein, especially plaintiff's Petition for Certiorari, that the defendant Commission has failed to give adequate consideration to the existing transportation facilities of the protestants within the State of Utah and the adequacy thereof.

- A. WYCOFF IS NOT A FIT AND PROPER PARTY TO RECEIVE A GRANT OF EXTENDED OPERATING AUTHORITY FROM THE COMMISSION.

Wycoff has failed to comply with the applicable laws, rules, and regulations concerning its operations.

Separating of Shipments:

The existing Wycoff authority, as evidenced by its Certificate No. 1679, is subject to the following restriction:

"Wycoff shall be limited to the transportation of shipments of not to exceed 100 lbs. on a weight basis. Shipment as herein used shall mean commodities moving on a single freight bill from one consignor to one consignee. Shipments shall not be separated to avoid this restriction."
(Emphasis added)

The great majority of the public witnesses who appeared on behalf of the applicant testified that in order to use Wycoff, shipments have been and are being at the present time separated to avoid the 100 lb. restriction which traffic rightfully should be transported by the protestants. The following are a few examples:

(a) Mr. Mike Ralphs of Amfac Electric Supply in Ogden, Utah, indicated in his prepared testimony (Ex. 66) that shipments were separated in order to use the service of Wycoff. On cross-examination (R. p.797), Mr. Ralphs testified as follows:

QUESTION: "And if you didn't split those shipments that traffic would have to be tendered to Uintah or some other carrier having authority?"

ANSWER: "That, or as I mentioned earlier, we may deliver it with our own delivery truck or the customer may elect to - to come down and pick it up."

(b) Mr. Dennis Duncan of Bennett's in Salt Lake City, Utah, also indicated, under direct examination, that his company "split" shipments. At page 849 of the Record, Mr. Duncan indicated:

"The reason we do it is Wycoff tariff states we can ship one shipment to one consignee in any given day which meets their 100 - lb. weight limit. And if a customer has a part of an order that they are in desperate need of today, they have specified that particular item for shipment today and to send the balance on the following day by Wycoff to save paying a minimum freight charge on common carrier for the balance of the order."
(Emphasis Added).

(c) Mr. Doyle Coombs of Doyle's Diesel Service in Nephi, Utah, likewise indicated the separation of shipments on direct examination. On cross-examination, Mr. Coombs was asked:

QUESTION: "Are those shipments separated because it is the understanding that Wycoff has to transport less than 100 lbs. at a time?"

ANSWER: "Yes"
(R. at p.878).

(d) Similarly, Mr. Scott Hansen of Amfac Electric Supply, St. George, Utah, was asked:

QUESTION: "So the shipments that have been split and shipped on separate days have been to avoid that restriction in the Wycoff authority?"

ANSWER: "Yes"
(R. at p.591).

Mr. Hansen was also asked:

QUESTION: "When you were visiting with the Wycoff representative to prepare this testimony, were you told by that representative that you should not split those shipments?"

ANSWER: "No"

(R. at p.594).

(e) Mr. A. Edward Mencimer of Interwest Veterinary Supply, also made several references to the practice of splitting shipments to use Wycoff. He was asked:

QUESTION: "* * * through the statement from my quick count five places in the statement that mention making shipments in two parts in order to use Wycoff rather than using some other carrier, presumably Uintah Freightways; is that correct?"

ANSWER: "Yes"

(R. at p.674).

This witness was asked further:

QUESTION: "I would assume from your prior testimony that this is a fairly common practice at your place of business?"

ANSWER: "Yes"

QUESTION: "Does it go on every day?"

ANSWER: "Probably"

(R. at pp. 675, 676).

This type of testimony was of such a recurring nature that even counsel for the applicant indicated at page 678 of the Record:

"We will stipulate that numerous and sundry of parties who shipped with Wycoff ship on different days and do split shipments.
(Emphasis Added)

Likewise, Commissioner Zundel indicated for the record at page 685:

"Well, but on the other hand, the record is filled with the split shipments and the testimony - and this testimony. * * *

The practice of splitting shipments constitutes a violation of the restriction in the Wycoff authority. A grant of authority where both applicant and the shippers are in blatant disregard of the law should not be condoned by granting an expanded certificate.

Not only is this "splitting" illegal, but it results in a diversion of traffic which should be tendered to plaintiffs and other carriers. It cannot be the basis for the grant of an expanded extended Certificate of Public Convenience and Necessity.

The case of National Service Corporation v. Gardikis, 172 P.2d 120, 110 Ut. 275 (1946), defines "separated" and "split" in accordance with the reasoning of protestants in this matter. In that case, the Utah Supreme Court dealt with the issue of what constituted an illegal splitting to avoid a legal limitation and found as follows:

"* * * In our opinion the expression "splitting up of transactions" simply means that a single transaction is not to be broken up into smaller units in order to evade this particular law. * * *"
(Emphasis Added)

The Commission should have determined that the shipments presently being separated to avoid the Wycoff weight restriction, do in fact violate the terms of the Wycoff authority. The grant of an authority with larger weight limits merely allows for the perpetration of illegal splitting - only on a larger scale. The Commission acted arbitrarily and capriciously when it failed to find that such a patent violation of an existing authority is an absolute bar to any grant of additional operating authority.

Non-Compliance of Wycoff Agency Operations:

Wycoff presently uses agent arrangements for the transportation and delivery of freight in and beyond commercial zones in various parts of the State of Utah. In Case No. 77-369-01, the Commission found, in its Report and Order dated January 25, 1978:

"* * * Wycoff is failing to adhere to the rules and regulations of this Commission with respect to lease and agency agreements, and it appears that agents may be violating certain safety requirements and equipment identification requirements. Such instances have included failure to notify this Commission of such arrangements and failure to placard or otherwise identify equipment being utilized. * * *"

The Commission further found:

"Wycoff has not been in compliance with the rules and regulations of this Commission pertaining to leasing and agency arrangements under General Order 90 and the destination commercial zones under General Order 81. * * *"

Since the Order of January 25, 1978, there has been no change in the Wycoff agency arrangements. The testimony of Mr. Randy Steinaker of Steinaker Chevron, Manila, Utah, (Ex. 54, pp.564-571), indicated that Elaine Lund, Wycoff's agent, uses several vehicles to deliver Wycoff freight, that Ms. Lund transports freight from Vernal, Utah, to Manila, Utah, and that the equipment is not identified as being in the service of Wycoff (R. pp.567-569). This is in blatant violation of the Commission's General Order 90 which sets forth the requirements for such an operation.

Wycoff was found to be in violation of the rules and regulations pertaining to leasing and agency arrangements on January 25, 1978. It continues to violate said provisions even in light of the Commission's Order to refrain from further violations and to comply with all of the rules, laws, and regulations of this Commission. This blatant disregard of not only the laws, rules, and regulations, but also of the Commission's Order compels the conclusion that Wycoff is not a fit and proper party to be granted additional operating authority in this proceedings.

Wycoff has Failed to File Express Schedules:

Wycoff's Certificate No. 1679 states:

"Wycoff should file with the Commission its express schedules and any modifications thereof. * * *"

Even so, Mr. Bruce Wycoff testified in this proceeding at page 13 of Exhibit 1 as follows:

"We clearly do not, and to my knowledge, never have, filed our schedules."

Such testimony further supports the contention of protestants that applicant is not a fit and proper party to receive additional operating authority in this proceeding.

Wycoff Fails to Serve in Accordance With This Commission's Mandate:

Certificate No. 1679 of Wycoff requires that:

"* * * Wycoff shall provide service at least once daily to all points and to the communities and a minimum of next -- day service and delivery between all such points on all established highways within the areas of the State of Utah to be served by Wycoff under said express shipment authority."

Mr. Wycoff testified in this regard that his company does not provide daily service to the Laketown or Bullfrog areas. Mr. Wycoff further volunteered, at page 15 of Exhibit 1:

"If we are wrong about this, I would like for the Commission to correct us so that we can comply in the future."

In Wycoff Company, Inc., vs. Public Service Commission of Utah, 369 P.2d, 283, 13 Ut.2d 123 (1962), the Utah Supreme Court upheld the assessment of an \$18,500.00 penalty by the Utah Public Service Commission for violations of the 500 lb. and 100 lb. weight restriction in Wycoff's certificate. In that case Mr. Wycoff

attempted to justify the violations by arguing that the limitations in his certificate were burdensome and difficult, if not impossible to police or enforce. That argument is described in the following language of the Supreme Court:

"Furthermore, Mr. Wycoff's own testimony went more to explanations of reasons why he felt he could not comply with the limitations on authority and thus to justify violations than to deny that they occurred."

Additionally, the testimony of Mr. Bart Lyman of Monument Valley Stage Lines, Inc. (Ex. 72), demonstrates that Wycoff does not now nor has it historically served any point in San Juan County south of Monticello, even though its Certificate No. 1679 authorizes it to do so.

Mr. Wycoff boldly admitted in Exhibit 1 his company's present non-compliance with the requirements contained in its Certificate and has asked for the necessary correction. The proper correction is a denial of the application - not a reward for flagrant violation of the law particularly where the conduct of Wycoff has previously been condemned by this Supreme Court. The grant of authority by the Commission must be set aside as arbitrary, capricious and unlawful.

B. WYCOFF DOES NOT HAVE THE FINANCIAL ABILITY TO PROPERLY PERFORM THE SERVICE FOR WHICH IT SEEKS A CERTIFICATE

Section 54-6-5, Utah Code Annotated (1953, as amended), provides in part:

"* * * Before granting a certificate to a common motor carrier, the Commission shall take in consideration the financial ability of the applicant to properly perform the service sought under the certificate * * * if the Commission finds that the applicant is financially unable to properly perform the service sought under the certificate, * * * the Commission shall not grant such certificate. (Emphasis added)

From December 31, 1976, until December 31, 1977, Wycoff's current assets (cash) decreased from Nine Hundred Forty-Nine Thousand Sixty-Nine Dollars (\$949,069.00) to Three Hundred Fourteen Thousand One Hundred Twenty-Seven Dollars (\$314,127.00), (Ex. 17, p.2). During the same period, working capital decreased by Four Hundred Ninety-Two Thousand Four Hundred Ninety-Six Dollars (\$492,496.00), (Ex. 17, p.6). Concurrently, Wycoff shows Accounts Payable of Nine Hundred Seventy-Nine Thousand Nine Hundred Sixty-Three Dollars (\$979,963.00), Eight Hundred Seventy-Two Thousand Four Hundred Seven Dollars (\$872,407.00) in accrued expenses and withholding, a One Million Dollar (\$1,000,000.00) note due in December, 1979, and miscellaneous current liabilities, (Ex. 17, p.3 and the Cross-examination of Mr. Casper, R. p.45-53).

Based on these facts, it can be seen that Wycoff is in a precarious financial position with decreasing current assets, while at the same time being subject to excessively high current liabilities. The current financial straits are aggravated by Wycoff's 1977 operating

ratio of 100.1 and of 101.7 for the first quarter of 1978 (net losses of .1% and 1.7% of gross revenue). Notwithstanding the current assets/liability problem and Wycoff's failure to show a profit, it plans to build a new terminal at a cost of Three Million Dollars (\$3,000,000.00).

Based on the evidence in this record, Wycoff cannot generate enough cash to even service the interest on the One Million Dollar (\$1,000,000.00) debt, evidenced by the note to Zion's First National Bank. Wycoff has failed to demonstrate that it is financially able to conduct the proposed operations, prohibiting a grant of authority and requiring this court to set aside the erroneous Order of the Commission which Order finds Wycoff financially fit.

C. WYCOFF HAS FAILED TO DEMONSTRATE ANY OPERATIONAL, FINANCIAL, OR ECONOMIC FEASIBILITY FOR THE PROPOSED OPERATION

Wycoff failed to show economic feasibility for the proposed operation. Witness after witness appeared in this proceeding and indicated that Wycoff had not yet determined its proposed freight charges upon approval of this application. Typifying such testimony was Mr. Don E. Durant of the Browning Company, Mountain Green, Utah. Mr. Durant was asked:

QUESTION: "Have you talked to Wycoff about the rates they'll charge you in the event this application is granted?"

ANSWER: "Some time ago I asked them what the rates were going to be and they just said they didn't know."

(R. at pp.533 and 534).

Wycoff's operating testimony indicated the same thing (R. at pp.19, 20). Wycoff has not shown this Commission how its operation would be conducted, much less that it could be conducted in a feasible manner. Both the operating witnesses and the public witnesses could only offer conjecture as to the effect of increased shipment size on Wycoff's service. The Commission must not approve an application without first determining whether the proposed operation is feasible, and whether the proposed operation can be afforded by the shipping public. The Commission must make such considerations in order to properly determine the effect of a grant on the best interests of the people of the State of Utah as required by §54-6-5, Utah Code Annotated (1953, as amended). In light of Wycoff's failure to make such a showing, the Commission's Order finding the same must be set aside.

- D. WYCOFF HAS FAILED TO DEMONSTRATE THAT THE EXISTING TRANSPORTATION FACILITIES WITHIN THE SCOPE OF THE INSTANT APPLICATION ARE INADEQUATE TO MEET THE NEEDS OF THE SHIPPING PUBLIC.

Wycoff, through its operating and public witnesses, demonstrated no inadequacy of the existing carrier service.

What the record in the instant matter does contain is an uncontroverted positive showing by the plaintiffs that the existing service is meeting the needs for transportation expressed by the public witnesses in a consistent, satisfactory, and reasonable manner. The evidence offered by plaintiffs was well documented and could not be refuted or rebutted by Wycoff.

It is clear that the existing authorized general commodity carriers engaged in intrastate commerce in Utah operate sufficient equipment, terminals, offices, and schedules to provide for the needs of the shipping public. Plaintiffs' documentary evidence disproved the contentions raised by the witnesses for applicant. Plaintiffs demonstrated the importance of Utah intrastate traffic to their continued financial well-being, and the effect that a diversion of traffic to Wycoff would have upon the ability of plaintiffs to continue providing transportation service to the shipping public in Utah. (Exs. 79-84).

Plaintiffs were alleged to have caused many inconveniences. With regard to personal inconvenience versus public convenience and necessity, the Utah Supreme Court has stated in Mulcahy vs. Public Service Commission, 117 P.2d 298, 30 (1941):

"But a thing may be a convenience or a necessity for many individuals and yet not be a public convenience or necessity. The convenience and necessity required to support an application for certificate are those of the public, not those of individuals".

In Lakeshore Motor Coach Lines vs. Bennett, 333 P.2d 1061, 1064, 8 Ut.2d 293, 227 (1953), there were forty-two witnesses who testified for the applicant:

"The import of the applicant's witnesses was that it would be convenient and desirable for them to have another carrier available for quick transportation service. They admitted without exception that their self interest would be served by having more carriers with more frequent schedules. In short, the speediest and cheapest transportation possible. In other words, from their point of view, the more carriers the better."

The Public Service Commission granted Lakeshore a Certificate of Convenience and Necessity but was overruled by the Supreme Court because the protesting carriers each presented evidence of the adequacy of its own service.

In view of the adequacy of the present service, it is imperative that the rights of the existing common carriers be protected through this court's reversal of the Commission's grant of the instant application.

E. A GRANT OF THE WYCOFF APPLICATION IS DEVASTATING TO PROTESTANTS AND OTHER CARRIERS WHO PRESENTLY OPERATE TRANSPORTATION FACILITIES IN THE TERRITORY PROPOSED TO BE SERVED.

The public witnesses testified that upon a grant of the Wycoff application, some or all of the traffic presently handled by plaintiffs and other existing carriers would be diverted to Wycoff. The testimony of the witness from Gordon Wilson Chevrolet in Salt Lake City at page 149

of the Record is typical. Such diversion would be ruinous to plaintiffs, with one-third to nearly one-half of their total intrastate revenue being derived from shipments Wycoff seeks to transport. Plaintiffs cannot afford any diversion at a time when rate increases must be sought in order to keep up with constantly rising costs of operation.

The Order of the Commission in this matter became effective upon its issuance and plaintiffs had no chance to stay the effectiveness of the Order prior to operations being begun by Wycoff. The effect of the Wycoff diversion upon plaintiffs is resulting in great and irreparable damage to plaintiffs consistent with a Motion for Stay filed with this court on the 10th day of May, 1979 and the Affidavits in support thereof.

Several Utah Supreme Court cases firmly document the wisdom of prohibiting carriers from duplicating the services of existing carriers. In Wycoff vs. Public Service Commission, 227 P.2d 323; 119 Ut. 342 (1951), the Supreme Court upheld the Public Service Commission's refusal to grant an application because the evidence permitted a finding that the public convenience and necessity did not require services of two carriers in the area. This case also instructs the Commission to consider the

record of the carriers existing within the scope of the application, the amount of business available and the type and number of carriers necessary to service the area adequately.

This is precisely the essence of the instant case. The granting of expanded authority to Wycoff will decrease the amount of freight hauled by the plaintiffs. Plaintiffs could lose between 32% and 46% of their business to Wycoff. If the volume of freight were unlimited, such competition would be desirable. Since the volume of business will not permit several solvent operations, the grant of the proposed application unduly burdens existing carriers.

Utah Light and Traction vs. Public Service Commission, 118 P.2d 683, 101 Ut. 99 (1941); Rudy vs. Public Service Commission, 265 P.2d 400, 1 Utah 2d 223 (1954); Goodrich vs. Public Service Commission, 198 P.2d 975, 114 Utah 296 (1948); and David R. Free d/b/a National Cartage Co., for a Certificate of Convenience and Necessity to operate as a common motor carrier of property in intrastate commerce, Case No. 6651 Sub No. 1 (1975) Utah Public Service Commission, all affirm the principle that additional service must be denied when there is evidence of the adequacy of an existing carrier. In Utah Light and Traction, supra, the Supreme Court said:

"When a territory is satisfactorily serviced and its transportation facilities are ample a duplication of such services which unfairly interferes with the existing carriers may undermine and weaken the transportation setup generally and thus deprive the public of an efficient, permanent service. The public interest is paramount."

The public witnesses testified that such a diversion of traffic would take place. The traffic Wycoff will divert is not new traffic but existing traffic. It is not a new service which Wycoff would render but rather a duplication of the existing adequate service. This diversion of traffic from the plaintiffs to Wycoff is not justified and must be remedied by this court setting aside the Order of the Commission.

F. A GRANT OF THE WYCOFF APPLICATION IS DETRIMENTAL TO THE BEST INTERESTS OF THE PEOPLE OF THE STATE OF UTAH

Section 54-6-5, Utah Code Annotated (1953, as amended), provides in part that prior to the grant of common carrier authority, the Commission must consider whether the granting of the certificate applied for will be detrimental to the best interests of the people of the State of Utah. The diversion of traffic from protestants by Wycoff has and will continue to greatly increase costs and result in curtailed or more expensive services. This is in turn detrimental to the people of the State of Utah who make use of the service of plaintiffs.

As costs of operation rise, the costs must be passed on to the ultimate user, the shipping public of the State of Utah. The Record in the instant proceeding is replete with evidence demonstrating that the present service of plaintiffs is reasonable and adequate to meet the needs of the shipping public. A grant of authority to Wycoff can only work to upset the present transportation scheme. In Wycoff Company vs. Public Service Commission, supra, the Utah Supreme Court held that the Utah Public Service Commission's conclusion that one common carrier can properly service an area and that another carrier competing for the same service in the same area would be detrimental to the best interests of the public was not arbitrary if there was evidence which reasonably tends to establish that the volume of business permits only one profitable operation. This is exactly situation we have at hand, and the Commission should have so found. The Record and testimony demonstrates that the volume of business will support only the operations of the existing carriers that have handled the traffic for many years. Another carrier, particularly (Wycoff), who by the nature of the authority granted can skim the "cream" and leave for the protestants the "skimmed traffic", competing for the same traffic in the same area would necessarily be detrimental to the best

interests of the shipping public. The evidence will not support the contrary finding of defendant Commission and this Honorable Court is obliged to set aside the Order of said Commission in order to avoid the detrimental effect upon the best interests of the people of the State of Utah who have historically relied upon the existing transportation facilities.

G. THE PUBLIC CONVENIENCE AND NECESSITY DOES NOT REQUIRE THE SERVICE OF WYCOFF.

In considering an application for a Certificate of Convenience and Necessity, the Utah Public Service Commission is required by Section 54-6-5, Utah Code Annotated (1953, as amended), to consider, among other things, whether or not the public convenience and necessity require the proposed service or any part thereof. Before a certificate can be issued, the Commission must find from the evidence that the public convenience and necessity require the service authorized. The evidence in this proceeding cannot support such a finding as the public witnesses have failed to demonstrate a need for the proposed service, and as plaintiffs have shown, the existing transportation facilities are entirely adequate.

This court has previously interpreted Section 54-6-5, Utah Code Annotated (1953, as amended), regarding the burden of proof to be met by an applicant seeking a

Certificate of Convenience and Necessity. In Lake Shore Motor Coach Lines v. Bennett, supra, the court had before it a Commission Report and Order in which the Commission had granted a motor carrier additional operating authority by expanding the scope of an outstanding certificate similar to the expansion here sought by Wycoff. Following review, the court set aside the modification in the certificate for the reason that the applicant there had not shown that the public convenience and necessity justified the proposed service. In reaching its conclusion, the court stated at 8 Ut.2d 297:

"Proving that public convenience and necessity would be served by granting additional carrier authority means something more than showing the mere generality that some members of the public would like and on occasion use such type of transportation service. In any populous area it is easy enough to procure witnesses who will say that they would like to see more frequent and cheaper service. That alone does not prove that public convenience and necessity so require. Our understanding of the statute is that there should be a showing that existing services are in some measure inadequate, or that public need as to the potential of business is such that there is some reasonable basis in the evidence to believe that public convenience and necessity justify the additional proposed service. For the rule to be otherwise would ignore the provisions of the statute; and also would make meaningless the holding of formal hearings to make such determinations and render futile efforts of existing carriers to defend their operating rights." (Emphasis added)

In specifically addressing itself to the evidence before it, the court said at 8 Ut.2d 298:

"... we make this generalization: there is ample specific evidence of the adequacy of carrier service in those areas and there is no specific affirmative showing of either lack or inadequacy of service in such areas by anyone who knew of and had attempted to use the services which were available.
(Emphasis added)

The court also found in the Lake Shore case that the shippers knew of the carrier service available but failed to use those services or found the services to be adequate when used. At 8 Ut.2d 298, the court said:

"Nevertheless, upon a survey of the record, we find no witness that made showing for the defendant (applicant): that he (shipper witnesses) was aware of the extent of the services presently available; that he had attempted to make use of them and found the services wanting; nor did the witnesses express actual dissatisfaction with the services presently offered. There being no such evidence, we see no basis for a finding that public convenience and necessity require additional service. The finding to that effect was therefore capricious and arbitrary." (Clarification supplied)

The concurring opinion in Lake Shore, supra, is to similar effect at 8 Ut.2d 299 as follows:

"HENROID, Justice (concurring):

"I concur for the sole reason that no one has shown from the record any evidence reflecting any inadequacy of service resulting from the operations of plaintiffs in their respective spheres, while on the contrary the service affirmatively was shown to have been satisfactory.

"Existing carriers that have expended risk capital, and have complied with tariff and other Commission requirements, ordinarily are entitled to protection against competition until a proposed competitor or someone else establishes by substantial evidence a failure to perform the service which the Commission has authorized and ordered them to perform." (Emphasis added)

Plaintiffs have affirmatively shown, through documentary evidence, that the service provided has been adequate to meet the needs of the shipping public. This fact was further borne out by the supporting shippers themselves.

The evidence in this matter discloses the service of the existing plaintiff carriers to be adequate. This Honorable Court, in a similar case, Mulcahy, et al. v. Public Service Commission, et al., supra, at 262 had this to say:

"An applicant desiring to enter a new territory, or to enlarge the nature or the type of the service he is permitted to render must therefore show that from the standpoint of a public convenience and necessity there is a need for such service; that the existing service is not adequate and convenient, and that his operation would eliminate such inadequacy and inconvenience. He must also show that the public welfare would be better served if he rendered the service than if the existing carrier were permitted to do so. The paramount consideration is the benefit to the public, the promotion and advancement of its growth and welfare. Yet the interests of the existing certificate holder should be protected so far as that can be done without injury to the public, either to its present welfare or hindering its future growth, development, and advancement." (Emphasis Added)

The Utah Supreme Court also addressed itself to this issue in the case of Utah Light and Traction Co. v. Public Service Commission, supra, when it held:

"If a need for new or additional service exists, it is the duty of the Commission to grant certificates of convenience and necessity to qualified applicants, but when a territory is satisfactorily served, and its transportation facilities are ample, a duplication of such service which unfairly interferes with the existing carriers may undermine and weaken the transportation set up generally and thus deprive the public of an efficient permanent service. True, existing carriers benefit from the restricted competition, but this is merely incidental in the solution of the problem of securing adequate and permanent service. The public interest is paramount." (Emphasis Added)

The record in the instant matter will not support the Commission's Finding of Public Convenience and Necessity requiring the proposed service of Wycoff and therefore, this Honorable Court must set aside the Order of the Public Service Commission as it is not in accordance with the evidence of record.

H. THE PREJUDICIAL NATURE OF THE COMMISSION'S REPORT AND ORDER AS AFFIRMED BY THE COMMISSION'S ERRATUM ORDER DEMONSTRATES THAT THE COMMISSION ACTED ARBITRARILY, CAPRICIOUSLY, WITH PREJUDICE, AND THEREFORE UNLAWFULLY.

As has been demonstrated above in the Statement of Facts and in the Argument, the evidence in the instant matter does not support the Report and Order of the Public

Service Commission dated March 13, 1979. The Commission's Findings Nos. 2, 3, 4, 14, 15, and especially 16, 17, 21, 22 and 23 demonstrate the Commission's predisposition in deciding this case. The Commission's Report and Order would have a reader believe that only the evidence offered by applicant was to be considered and that all of the documentary evidence offered by plaintiffs is to be belittled. The Commission's Finding No. 26 is directly contrary to the evidence in indicating that plaintiffs showed no violations by Wycoff of the type Wycoff was committing when its first application of this nature was dismissed by the Commission on fitness grounds. As indicated above, the testimony offered by Wycoff and by its supporting shippers demonstrates that at the present time, Wycoff continues to illegally "split" many of its shipments and continues to violate the laws, rules, and regulations pertaining to its operations as discussed above under Part A of this Argument.

The balance of the Report and Order dated March 13, 1979 which plaintiffs here seek to have set aside, further demonstrates the predisposition on the part of the Commission and also makes obvious the fact that the Commission did no more than "rubberstamp" with a signature the draft Report and Order prepared by counsel for applicant.

In reviewing cases for the Public Service Commission, the court is to ascertain whether the Commission's decision is based upon substantial evidence. If it is not, it is arbitrary and capricious and must be set aside. See Uintah Freight Lines v. Public Service Commission, 119 Ut. 491, 229 P.2d 675 (1951) and cases cited therein.

The Commission's Order herein does not have substantial support in the record (see Plaintiffs' Petition for a Writ of Certiorari). It must therefore be set aside consistent with all of the foregoing.

CONCLUSION

Defendant Wycoff seeks to institute a new motor carrier service at a time when the plaintiffs are providing an efficient and adequate service. Plaintiffs rely upon the revenues derived from the transportation to allow them to continue to adequately and economically serve the shipping public and thereby the best interests of the State of Utah. In granting the application, the Commission ignored the failure of Wycoff to adequately demonstrate that the public convenience and necessity require the proposed operation and likewise ignored the detrimental effects upon plaintiffs and in turn, upon the shipping public. The Commission further ignored the documented evidence offered by plaintiffs demonstrating the adequacy of the existing service.

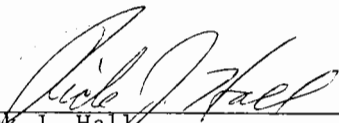
Wycoff has failed on every count to satisfy its burden under Section 54-6-5 U.C.A. (1953, as amended), to show the necessity for granting of this application. The Commission need only make an adverse finding on one point in order to justify the denial of a Certificate of Convenience and Necessity. Fuller Topance Truck Co. vs. Public Service Commission, 96 P.2d 722, 99 Ut. 28 (1939) and Salt Lake and Utah R.R. Corporation vs. Public Service Commission, 149 P.2d 647, 106 Ut. 403 (1944). It has failed to show that it is a fit and proper party, has failed to show inadequate existing service, has failed to show its services will not duplicate existing service, has failed to show financial fitness and has wholly and completely failed to show the operational feasibility of its proposed service.

The Commission, by its failure to consider the evidence of plaintiffs and by its adoption of an Order prepared by applicant's counsel, which Order on its face demonstrates bias and prejudice, has acted in an arbitrary, capricious and unlawful manner.

The Report and Order as well as the Erratum Order of the Commission are unreasonable and are not supported by the evidence or the law and should be set aside.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that I mailed two copies of the foregoing Brief to each of the following parties: Frank S. Warner, Attorney for defendant Wycoff, 543 25th Street, Ogden, Utah 84401; and upon Mr. Arthur Allen, Jr. Assistant Attorney General, 236 State Capitol Building, Salt Lake City, Utah 84114 by first-class mail, postage prepaid, this 6th day of August, 1979.

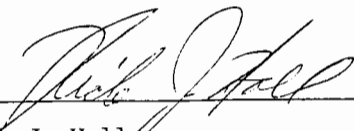

Rick J. Hall

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